STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY LYNN BERRY,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 249430
Montmorency Circuit Court
LC No. 02-000109-FC

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b, and first-degree home invasion, MCL 750.110a. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to consecutive prison terms of thirty-five to sixty years for the first-degree CSC conviction and twenty to forty years for the home invasion conviction. He appeals as of right. We affirm.

I. Underlying Facts

On September 19, 2001, defendant allegedly broke into the ninety-year-old victim's home in Atlanta, Michigan, and sexually assaulted her. The victim[1] testified that she was in bed when she noticed a light outside her window. As she went toward the door, two men came inside. One perpetrator pushed the victim back onto the bed and sat beside her. The same perpetrator put his hand on her leg, and the victim pushed it away. As the two men were leaving, one man threatened to return "and get her" if she reported the incident to the police, or if he saw a police car "in [her] yard." After the men left, the victim discovered that her purse had been moved, and all of her fifteen one-dollar bills were missing.

Later that night, one of the men forced the chain off the victim's door and came back inside with a flashlight. When the victim confronted the perpetrator about her missing money, he initially denied taking it, but thereafter went outside and returned with some money. The perpetrator sat on the bed beside the victim, asked for some paper towel, went into the kitchen to

[1] The trial court admitted the victim's preliminary examination testimony at trial because the victim was unavailable to testify due to health reasons.

retrieve the paper towel, handed the money to the victim, and directed her to use the paper towel to wipe off any fingerprints. After the victim wiped the money, the perpetrator retained the paper towel. The victim got up and turned on a lamp, but the perpetrator immediately turned it off and pushed the victim back onto the bed. Thereafter, the perpetrator removed the victim's pajama bottoms, exposed his penis, and was "all over" the victim. The victim pushed the perpetrator "as hard as [she] could," noting that he was lying directly on her pacemaker. The perpetrator, who was wearing hard rubber gloves, put his hand over the victim's face and mouth. When the victim refused to put her hand on the perpetrator's penis, as directed, he used his hand and forced her to touch his penis, which never became erect. The perpetrator forced the victim's legs apart, "put his face right down on [the victim's vagina]," and touched her vagina with his tongue. The victim indicated that she unsuccessfully attempted to fight him off. After the assault, the perpetrator asked the victim if she "got any thrill or any good feeling out of this at all?" Before leaving, the perpetrator made the victim promise not to report the incident, and threatened to return if she told anyone or if he saw the police in her yard.

On September 20, the victim's friend took the victim away from her home and they reported the incident to the police. The victim described the perpetrator as "quite a broad man" with broad feet. The perpetrator was barefoot, wore a wet, cold rubber cap and rubber gloves, and had a "very bad" smell of "some kind of booze." The victim indicated that she could hardly see the perpetrator. A doctor who treated the victim on September 21 testified that she had bruising on her nose and chin, but no trauma to the vaginal area.

While leaving the victim's residence on the evening of September 21, officers observed a pickup truck parked at a cabin "right next to" the victim's residence. On September 22, the police returned and noticed bare footprints in the sand outside the victim's residence that led to the rear door of the cabin. A pickup truck registered to defendant was parked at the cabin.

The owner of the cabin, who was at the cabin the weekend before the incident, testified that defendant had been staying in a tent in the woods. During that weekend, however, the owner invited defendant to stay inside the cabin because it was raining and defendant's truck was not working. The owner allowed defendant to remain inside the cabin after the owner left for the week. The owner indicated that defendant was drinking a lot of vodka inside and outside the cabin. The owner also indicated that defendant had asked "a lot of general questions" about the victim. Included in defendant's inquiries were questions regarding the victim's age and whether she had many visitors.

During a search of the cabin the police confiscated a dollar bill and paper towels wadded up in a trash container, vodka bottles in a barrel outside the cabin, and gloves with rubber tips and a flashlight from the cabin floor. Two hairs were retrieved from one of the rubber gloves. DNA testing on the two hairs revealed that they matched a hair sample taken from the victim.

The police also collected blankets, bedding, and pajama bottoms from the victim's bedroom, as well as hairs from the bed. A hair found on the victim's bed did not match the victim or defendant, and no further DNA testing was performed on the hair. Defendant was also excluded as a contributor of stains found on the victim's pajama bottoms and bedding. A forensic scientist testified that blue denim jeans could have caused certain fabric impressions on the victim's bedding.

Mark Boughner testified that he drove defendant to the cabin during the afternoon of September 19. Defendant was wearing blue jeans, and had been drinking "some kind of liquor." Boughner next saw defendant on September 20 at Tressia Hensley's residence. Defendant remarked that he was at Hensley's house because "a couple of guys had come to the cabin causing problems and that he shot one of them in the knees." Hensley corroborated Boughner's testimony in that regard, and added that she and defendant drank vodka while at her house.[2] On the morning of September 21, Boughner drove defendant back to the cabin to get his belongings, and then drove him to a campsite. He noted that defendant's truck was not operable at the time.

Defendant's girlfriend, Susan Piper, testified that defendant phoned their Dearborn Heights home on September 21 from a campsite and asked her to come to the campsite. Piper drove to the campsite the following day and spent the night with defendant. The next morning, defendant loaded his belongings in Piper's truck but stated that he was not leaving with her. Defendant gave Piper a gun case that she believed contained a gun, bullets, and the key to the cabin. Piper was thereafter unaware of defendant's whereabouts. About one month later, Piper received a call from a worker at a blood donor center, which led her to believe that defendant was in Pennsylvania. Defendant subsequently called Piper from Pennsylvania, requesting that she forward his Social Security Income ("SSI") check. She later sent two additional SSI checks to Florida. Piper subsequently discovered that defendant was using an alias, which was the name of her deceased former boyfriend. According to Piper, defendant was aware that her former boyfriend's personnel effects, e.g., his birth certificate, were kept at Piper's residence. She also indicated that defendant drank a lot of vodka but that he did not walk around barefoot. When defendant returned to Michigan in March 2002, Piper visited him at a hotel and unsuccessfully attempted to convince him to turn himself in.

In March 2002 the FBI and a Dearborn police fugitive team arrested defendant, who was still using an alias, in Detroit. Defendant admitted during an interview that he had used an alias and stayed in motels in Florida and Pennsylvania. Although defendant claimed that he used an alias because of a pending gun charge, the police subsequently discovered that the claim was untrue. Defendant acknowledged that he was staying in the cabin next to the victim's residence on September 19, but denied ever being inside the victim's residence or having any involvement in the charged crimes. Defendant claimed that he was with Boughner on the night of September 19.

A former St. Clair Shores detective testified that he investigated a 1978 breaking and entering of a residence that occurred after midnight and involved the sexual assault of a ninety-six-year-old woman in her bedroom. The perpetrator broke open the door, removed his shoes, put his hand over the woman's mouth, removed the woman's nightgown, opened her legs, and attempted vaginal penetration.[3] Following the incident, the officer spoke to defendant.

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[2] After defendant left Hensley's house on September 20, she had no further contact with him until after he was jailed in March 2002. At that time, Hensley received correspondence from defendant, which she perceived as a threat directing her to "change [her] story." The letter was admitted into evidence.

[3] Defendant was unable to have vaginal intercourse with the woman.

Defendant admitted his involvement in the sexual assault and admitted drinking vodka. The officer indicated that defendant lived a few houses away from the woman's house, on the same side of the street.

II. Other Acts Evidence

Defendant first claims that the trial court abused its discretion by allowing evidence of the 1978 sexual assault of a ninety-six-year-old woman as a "signature crime." Defendant maintains that the 1978 offense was not significantly similar to the charged sexual offense and was unduly prejudicial. We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b)(1). Other acts evidence is admissible under MRE 404(b) if it is offered for a proper purpose, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice under MRE 403.[4] *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

If the other acts evidence is offered as evidence of the defendant's identity as the perpetrator of the crime through modus operandi, "[t]he [commonality of circumstances] must be so unusual and distinctive as to be like a signature." *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982) (citation omitted).[5] In *Golochowicz*, our Supreme Court identified

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[4] Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

[5] We acknowledge that, in *VanderVliet*, *supra*, our Supreme Court modified the *Golochowicz* test for admission of evidence under MRE 404(b). However, *Golochowicz* is still applicable to an analysis of logical relevance where the other acts evidence is offered to show identification through modus operandi. See *VanderVliet*, *supra* at 66 ("*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a modus operandi theory to prove identity"); see also *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998) (the *Golochowicz* test "remains valid" when the proponent of the other acts evidence uses it "to show identification through modus operandi"). Therefore, in this case, where the prosecutor sought to use the other acts evidence as a theory of the perpetrator's modus operandi to prove defendant's identity, the requirements stated in *Golochowicz* are applicable.

the four requirements of logical relevance when the proponent uses a modus operandi theory to prove identity: (1) there must be substantial evidence that the defendant committed the other act; (2) there must be some special quality of the act that tends to prove the defendant's identity; (3) the other acts evidence must be material to the defendant's guilt of the charged offense; and (4) the probative value of the other acts evidence must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 309. See also *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

We find no abuse of discretion in the trial court's decision to admit the other acts evidence. The evidence was not offered to show that defendant had a bad character. It was the prosecution's theory that defendant committed the charged crime, and the challenged evidence was probative of defendant's identity as the perpetrator. Further, the requirements of logical relevance were satisfied. First, there was substantial evidence that defendant committed the 1978 act. The officer who investigated the 1978 act testified that defendant admitted his involvement and, as noted by the trial court, there was a conviction. Second, there were some special qualities that tended to prove defendant's identity. As noted by the trial court, remarkably, the victims of both assaults were in their nineties, and the perpetrator was substantially younger.[6] Additionally, for both acts, the perpetrator broke into the victims' residences, and both were located in close proximity to where defendant was residing. Also, during both acts, the perpetrator did not have penile penetration, did not have an erection, was shoeless, and had been drinking vodka. Given these facts, we conclude that the commonality of circumstances in the 1978 act and the charged crime are so significantly similar, unusual, and distinctive to constitute a signature crime. *Golochowicz*, *supra*.

Moreover, contrary to what defendant suggests, the evidence was not inadmissible simply because the very nature of the evidence is prejudicial. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, and, under the circumstances, defendant has not demonstrated that he was unfairly prejudiced. See *Starr*, *supra* at 499. Accordingly, the trial court did not abuse its discretion by concluding that the 1978 act was a "signature crime," and therefore admissible under MRE 404(b).

III. Exclusion of Witness Testimony

Next, defendant argues that the trial court erred by excluding evidence of "third-party guilt," thereby compromising his right to present a defense. We disagree.

Defendant offered the testimony of Jason Bible to support his theory that Larry Miller was responsible for the crimes. In a separate record outside the presence of the jury, Bible indicated that he met Miller at a lake campsite in the summer of 2001. Bible camped at that location from May 2001 until September or October 2001. He noted that the location was about a twenty-five-minute walk from the victim's house. Bible indicated that Miller arrived at the campsite on April 7, and left September 11. At the time, Miller was living in a brown pickup

[6] According to the judgment of sentence, defendant's date of birth is November 21, 1953.

truck.[7] One morning, Miller asked Bible if he heard about a breaking and entering and a lady being robbed of about $12. Bible had not heard about the incident, but he subsequently read about it in the paper a few days later. Bible described Miller as six-feet, two inches tall, and 190 to 195 pounds, with a proportional head. He further indicated that Miller drank, went shoeless most of the time, and was from Atlanta, Michigan. After Bible saw defendant in the Montmorency County Jail in May 2002, he informed the police about Miller's remarks.

In response to the trial court's inquiry regarding relevance, defense counsel claimed that the testimony showed that there was another person in the area who shared defendant's description. In excluding the evidence, the trial court concluded:

> It's speculative and what it proves, what it proves to me is that there are [sic] more than one person six foot two within this area and more than one person who might have driven a brown truck, we don't even know if he did drive one, but more than one person who might have driven a brown truck. Too highly speculative to admit to the jury as evidence.

A trial court's decision to exclude evidence that tends to incriminate another individual for the charged offense is reviewed for an abuse of discretion. *McDaniel, supra*; *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987).

A defendant in a criminal case has the constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, § 13; *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). In *Kent, supra* at 793, this Court observed:

> Other jurisdictions have held that evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator.

In other words, a trial court may properly exclude testimony tending to identify another person as the perpetrator where the evidence does no more than raise a mere suspicion that someone else was responsible for the offense. *Id*.

We agree with the trial court that the proposed testimony constituted mere conjecture, was tenuous, and lacked substantive facts linking Miller to the crimes. In fact, during the prosecutor's cross-examination of Bible, he even admitted as much. After the prosecutor asked Bible whether he was "just kind of speculating that [Miller] may have left [the campsite]," the following exchange occurred:

> *A.* I tried to tell them, the Defense Attorney, that I really didn't know exactly what happened. All I said was, it was pretty peculiar to me that he would know about it before it came out in the papers, that's all.

[7] According to defense counsel, at some point the victim said that the perpetrator drove a brown pickup truck. However, the parties acknowledged that there was no testimony in that regard.

Q. But he could have heard it from somebody, because you weren't with him all the time, right?

A. That's correct.

Q. So you really don't have any idea.

A. I have no eyewitness knowledge.

Q. Okay. And you indicated that you read it in the paper a couple of days later?

A. That's correct.

Q. Yet you didn't contact the police did you?

A. No Ma'am.

* * *

Q. In fact you didn't speak to the Sheriff until after you had been in the cell with the Defendant, that's correct?

A. That's correct.

Q. So this didn't even come up until you'd spent some time with [defendant]?

A. That's correct. [Tr I, p 94.]

In sum, the proposed testimony did not constitute competent evidence that someone other than defendant was responsible for the charged offenses. *Id*. Therefore, the trial court did not abuse its discretion by excluding Bible's testimony. *Id*.

We note that in a footnote in his brief defendant states that Miller's statement to Bible was admissible under MRE 804(b)(3). Defendant's cursory presentation of this assertion in a footnote, without adequate analysis, is insufficient to properly present the issue for this Court's review. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Even if we considered the issue, it does not provide a basis for relief. Hearsay is not admissible as substantive evidence unless an exception applies. MRE 802. As the proponent of the evidence, defendant had the burden of showing that the foundational prerequisites for admission under MRE 804(b)(3) were satisfied. See *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). The first requirement for introducing a statement against interest is that the declarant be unavailable. See MRE 804(a) and (b). Here, defendant failed to establish Bible's unavailability under MRE 804(a). Accordingly, this issue is without merit.

IV. Jury Questions

Next, defendant asserts that the trial court violated his due process right to an impartial jury by permitting the jurors to submit questions for witnesses during the trial. We disagree.

Because defendant did not object to either the instruction that allowed the jurors to ask questions,[8] or any specific questions submitted by the jury, this issue is unpreserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

In *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972), our Supreme Court held that "[t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." Despite defendant's assertion that "this practice should stop . . . as a matter of law reform," this Court is bound by the Supreme Court's decision in *Heard*. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Because the trial court had the discretion to allow the jurors to submit questions, *Heard*, *supra*; *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982); see also CJI2d 2.9, and our review of the subject questions reveals that they do not reflect juror bias or prejudice, defendant has not shown plain error. *Carines*, *supra*. This issue does not warrant reversal.

V. DNA Testing

Defendant argues that he has a due process right to court-ordered, post-conviction DNA testing of an unidentified hair found on the victim's bed.[9] We disagree.

Because defendant never moved for DNA testing of the unidentified hair below, either before or after trial, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

This issue is without merit. Initially, defendant has failed to provide any applicable, supportive authority for his assertion that, under the circumstances of this case, he has a due process right to court-ordered, post-conviction DNA testing of the unidentified hair found on the victim's bed. Therefore, this issue is not properly presented for review. *Watson*, *supra*. Additionally, as previously indicated, defendant does not assert, nor does the record reveal, that he ever requested such testing below. See, e.g., *People v Vaughn*, 200 Mich App 611, 619-620; 505 NW2d 41 (1993), rev'd on other grounds 447 Mich 217 (1994), wherein this Court rejected the defendant's similar claim, noting that the defense was aware of the availability of DNA testing at the time of trial, but never requested such testing below, and there was no indication that the defense would have been prohibited from conducting such testing.

Furthermore, the DNA expert's testimony revealed that additional testing of the unidentified hair was not performed because it was definite that it did not originate from defendant or the victim. As such, whatever exculpatory value the unidentified hair had to

[8] During trial, the court instructed the jurors that they may submit questions in writing at the conclusion of attorney questioning of each witness. The trial court indicated to the jurors that it would review each question for compliance with evidentiary rules before it asked the witness the question.

[9] This Court denied defendant's motion to remand to have the unidentified hair found in the victim's home compared to the state police DNA database.

suggest that a different individual committed the crime, that matter was presented to the jury. Moreover, contrary to what defendant claims on appeal, there was substantial evidence linking him to the crime.

Finally, to the extent that defendant implies that, under these facts, the prosecution should have ordered additional DNA testing of the hair, due process does not require that the prosecution seek and find exculpatory evidence. *People v Coy (After Remand)*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Similarly, neither the prosecution nor the police are required to exhaust all scientific means, *People v Allen*, 351 Mich 535, 548-549; 88 NW2d 433 (1958), and the prosecution is not required to negate every theory consistent with a defendant's innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

VI. Defendant's Standard 11 Brief

In a standard 11 brief filed in propria persona, defendant raises several claims of ineffective assistance of counsel.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that defense counsel was ineffective for failing to procure a DNA analysis of an unidentified hair found on the victim's bed. As discussed in part V, however, the exculpatory value of the unidentified hair was presented to the jury, and there was substantial evidence linking defendant to the crime. In light of this, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra*.

Defendant also claims that defense counsel failed to adequately cross-examine Boughner, thereby preventing the introduction of facts that would have demonstrated the witness' bias and lack of credibility. Defendant has failed to sufficiently support his assertion that defense counsel failed to adequately cross-examine Boughner. Defendant concedes that defense counsel established through his cross-examination that Boughner had a prior armed robbery conviction, and that Boughner did not testify as to everything he told the police. Further, decisions about what questions to ask are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the

benefit of hindsight." *Id*. at 76-77. Here, it is not apparent from the record that counsel was deficient in his cross-examination of Boughner.

Although defendant also claims that counsel was ineffective for failing to offer "possible alibi testimony" through Boughner, he has not provided a witness affidavit, or identified the substance of the proposed testimony that allegedly would have been valuable to his defense. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted). Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged inaction, the result of the proceeding would have been different. *Effinger*, *supra*.

Lastly, defendant claims that defense counsel failed to "impeach" two police officers after each testified to observing footprints at the crime scene that led in two different directions. Even if there was a basis to impeach the officers' testimony, defendant cannot establish prejudice. The evidence revealed the existence of footprints outside the victim's residence that led to the rear door of the cabin where defendant was staying, and that the victim had never been inside that cabin. Inside the cabin, the police found two hairs on a glove that matched a hair sample taken from the victim. In light of the evidence, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Id*.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra